Nos. 81-2399 and 82-358

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

METROPOLITAN EDISON COMPANY, JERSEY CENTRAL POWER AND LIGHT COMPANY and PENNSYLVANIA ELECTRIC COMPANY,

Petitioners,

v.

PEOPLE AGAINST NUCLEAR ENERGY, *et al.*,

Respondents.

UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA,

Petitioners,

v.

PEOPLE AGAINST NUCLEAR ENERGY, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF ATOMIC INDUSTRIAL FORUM AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the National Environmental Policy Act requires continuing reassessment of the environmental effects of operation of a licensed nuclear power plant in the absence of any proposal for federal action.

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PRELIMINARY STATEMENT

On November 1, 1982 this Court granted the motion of the Atomic Industrial Forum ("Forum") for leave to file an *amicus curiae* brief supporting the petitions for writs of certiorari in this case. The Forum now respectfully submits its *amicus curiae* brief on the merits. The Forum has obtained the consent of all parties in this litigation to the filing of this brief, as reflected in their letters filed in this Court.

INTEREST OF THE ATOMIC INDUSTRIAL FORUM

The Forum is an association of about 550 domestic and overseas organizations involved in the peaceful uses of nuclear energy. The membership includes electric utilities, manufacturers, architect/engineer/construction firms, service organizations, consultants, uranium producers, radionuclide and radiopharmaceutical suppliers, financial institutions, universities, labor unions, government agencies and research laboratories. One hundred and five of the Forum's 122 domestic electric operating utility members rely on, or plan to rely on, nuclear power generation for at least a portion of their power needs.

The opinion below severely prejudices the interests of Forum members because of its conclusion that the operation of nuclear power plants by those members currently holding Nuclear Regulatory Commission ("NRC") operating licenses constitutes proposed federal action subject to continuing reassessment under the National Environmental Policy Act, 42 U. S. C. § 4332(C) (1976) ("NEPA"). This ruling robs the NRC licensing process, on which the Forum's members have relied by investing billions of dollars, of any finality. It implies that operating licenses, issued for terms of up to forty years after exhaustive administrative review, may be terminated at any time upon a finding by the NRC or a reviewing court that the NEPA cost/benefit balance no longer favors continued operation or that there are environmentally preferable alternatives. Moreover, it is likely to divert NRC and industry resources from reviewing the safety and environmental impacts of new nuclear power plants to reassessing the environmental impacts of currently operating plants. The ruling is also detrimental to those Forum members with nuclear power plants under construction, who thereby have a vital interest in the timely completion of the NRC licensing process.[1]

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[1] Current NRC estimates are that nine reactors presently under construction will be ready to receive operating licenses in 1982, and 15

Footnote continued on following page.

Finally, the interests of the Forum in this case are congruent with the national interest. Both Congress and the Executive Branch have determined that generation of electricity through nuclear power is important to national well-being and security, in that reliance on dwindling domestic sources and undependable foreign sources of oil and gas is thereby reduced. The decision below is inimical to national policy in that the court created needless and legally unsupportable obstacles to the continued commercial development of nuclear power.

SUMMARY OF ARGUMENT

The court of appeals held that routine day-to-day operation of licensed nuclear power plants within the terms of licenses previously issued by the NRC imposes on that agency a continuing obligation to reassess the plants under NEPA. This sweeping ruling went far beyond what was necessary to establish the applicability of NEPA to the specific facts of the TMI-1 restart proceeding. Even though petitioners did not tender this issue for review, the Court should nevertheless reach it because it is a predicate to intelligent resolution of the psychological distress issue. Contrary to the lower court's decision, routine operation of a licensed plant does not constitute a proposal for major federal action within the purview of NEPA; instead, a utility's operation of its plant is continuing private action. Neither the Act, nor this Court's interpretations of it, nor existing regulations support the lower court's sweeping ruling.

Moreover, the majority's decision is in direct conflict with Congressional intent. By enacting the Atomic Energy Act of 1954, 42 U. S. C. § 2011 *et seq.* (1976) ("AEA"), Congress

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more will receive operating licenses in 1983. See Letter from Nunzio J. Palladino, Chairman, NRC, to the Honorable Tom Bevill, Chairman, Subcommittee on Appropriations, House Committee on Appropriations (September 30, 1982) (enclosing monthly status reports as required by House Report 96-1093).

intended to encourage the peaceful development of commercial nuclear power, in part by providing for the issuance of commercial operating licenses for periods of up to 40 years. By holding that the operation of nuclear power plants by private licensees is subject to continuous federal environmental cost/benefit balancing, the lower court destroyed the finality of the NRC licensing process, and undermined this Congressionally created incentive to the commercial development of nuclear power. This judicial modification of the statutory scheme adopted by Congress is contrary to this Court's instructions in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, 557-58 (1978).

Before the decision of the court of appeals, only the NRC's licensing decisions in issuing construction permits, operating licenses for nuclear power plants, and amendments to such permits and licenses constituted proposed federal actions requiring environmental review in conformity with NEPA. That certainty in the NRC licensing and NEPA process has been seriously undermined by the decision below, which sweepingly imposes a continuing obligation to continually reassess all previously licensed nuclear power plants. This broad ruling was unnecessary to find that NEPA applies to the specific facts of the TMI-1 restart proceeding. If allowed to stand, the ruling is likely to inflict on utilities, the NRC, and federal courts the substantial burden of preparing and reviewing endless, redundant environmental documents re-justifying licensing decisions which have already been made. NRC and industry resources should instead be used to study and improve the safety of operating plants, and to assess the safety and environmental impacts of proposed plants.

I.

THIS COURT SHOULD ADDRESS THE ISSUE WHETHER NEPA REQUIRES THE NRC TO REASSESS CONTINUALLY THE ENVIRONMENTAL IMPACTS OF LICENSED NUCLEAR POWER PLANTS.

The Forum supports the position of Petitioners United States Nuclear Regulatory Commission and United States of America in No. 82-358 ("the Government"), and Petitioners Metropolitan Edison Company, Jersey Central Power & Light Company and Pennsylvania Electric Company in No. 81-2399 ("Private Petitioners"), that psychological distress allegedly induced in persons living near nuclear power plants is not an environmental impact cognizable under the National Environmental Policy Act, 42 U. S. C. § 4321 *et seq.*, (1976) ("NEPA"). However, this brief does not repeat arguments already presented by the petitioners. Instead, it addresses another important issue raised by the decision below.

The court of appeals held that NEPA imposes on the Nuclear Regulatory Commission ("NRC") a continuing obligation to reassess the environmental impact of day-to-day operation of licensed nuclear power plants. Private Petitioners apparently chose to concentrate on the psychological distress issue instead because its resolution will dispose of the immediate impediment preventing restart of the undamaged reactor at Three Mile Island Unit 1 ("TMI-1"). The Government also chose to not tender the NEPA issue for review; it suggested that the ruling was dictum, and that the decision could rest on the narrower ground that restart of TMI-1 constitutes a proposal for major federal action, rather than on the sweeping proposition that all licensed nuclear reactors are subject to continuing reassessment under NEPA. Petition of the United States Nuclear Regulatory Commission and United States for Writ of Certiorari at 17 n. 12.

However, the Government's position before the Court regarding the continuing obligation aspect of the decision below has been inconsistent. In a brief filed recently with this Court in *Natural Resources Defense Council, Inc.* v. *United States Nuclear Regulatory Comm'n*, 685 F. 2d 459 (D. C. Cir. 1982), *cert. granted sub nom., Baltimore Gas & Elec. Co.* v. *Natural Resources Defense Council, Inc.*, 51 U. S. L. W. 3419 (Nov. 29, 1982) (No. 82-524), Petition of the United States and United States Nuclear Regulatory Commission for Writ of Certiorari at 21, the Government asserted that the court of appeals held in this case that "NEPA imposes on the NRC a continuing obligation to reassess the environmental impacts of a licensing decision. . ." It argued that this continuing obligation might cause the S-3 decision to affect adversely already licensed reactors. The apparently contradictory positions set forth by the Government in petitions to this Court confirm the Forum's view that the continuing NEPA obligation ruling is too important to be left in "legal limbo." Brief of Atomic Industrial Forum in Support of Petitions for Writs of Certiorari at 6 n. 3. The uncertainty engendered by this aspect of the decision is manifest; this Court should address both holdings of the court of appeals.

The fact that petitioners chose not to tender the NEPA issue for review should not prevent the Court from resolving this question. Respondent had argued below that psychological distress was cognizable either under the Atomic Energy Act of 1954, 72 U. S. C. § 2011 *et seq.* (1976) ["AEA"], or in the alternative, under NEPA. Judges Wilkey and McGowan properly rejected the argument that the AEA applied; Judges McGowan and Wright concluded that NEPA does require consideration of psychological distress. The NEPA majority relied on its interpretation of the NRC's responsibilities under NEPA as the statutory foundation on which to erect an obligation to consider psychological distress. Accordingly, resolution of the continuing NEPA obligation issue is "a

predicate to intelligent resolution" of the question whether psychological distress is thus cognizable under NEPA, and it is properly before the Court for decision. *Cuyler* v. *Sullivan,* 446 U. S. 335, 342 n. 6 (1980); *Vance* v. *Terrazas,* 444 U. S. 252, 259 n. 5 (1980). In any event, this Court's power to decide a case is not limited by the precise terms of the question presented. *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U. S. 313, 320 n. 6 (1971). *See also Piper Aircraft Co.* v. *Reyno,* ____ U. S. ____, 102 S. Ct. 252, 261 n. 12 (1981); *Procunier* v. *Naverette,* 434 U. S. 555, 559 n. 5 (1978).

There is no doubt that this Court should also address the psychological distress issue raised by petitioners. Nevertheless, the lower court's ruling that the NRC must continually reassess the environmental impact of all nuclear power plants cannot be permitted to stand uncorrected. The Forum believes that this brief will assist the Court in considering this important aspect of the decision below which might otherwise escape review.

II.

THE COURT OF APPEALS ERRED IN RULING THAT NEPA REQUIRES THE NRC TO REASSESS CONTINUALLY THE ENVIRONMENTAL IMPACTS OF LICENSED NUCLEAR POWER PLANTS.

Analysis of the court of appeals' rationale supporting its creation of a continuing obligation to comply with NEPA establishes that the court impermissibly ignored the plain language of NEPA, this Court's interpretations of the Act, and regulations promulgated by the Council on Environmental Quality ("CEQ"). Specifically, the lower court determined that the March 1979 accident at TMI-2 may have resulted in significant new circumstances regarding the environmental effects of operating TMI-1 because the accident allegedly caused psychological distress in residents near the area, and held that the NRC must consider that distress as an environmental

impact before making a decision on the restart of TMI-1. The court's rationale was that the NRC's continuing supervisory responsibilities over TMI-1 and other licensed nuclear power plants constitutes federal action within the scope of NEPA, and that the NRC therefore has a continuing obligation to reassess environmental effects under NEPA. *People Against Nuclear Energy* v. *United States Nuclear Regulatory Comm'n*, 678 F. 2d at 231. The court analogized the NRC's regulatory responsibilities regarding TMI-1 and other licensed reactors to "a more or less continuing agency decision to sustain an ongoing program that the agency has discretion to terminate at any time." *Id.* at 232. Contrary to the manner in which the Government has characterized the ruling in the instant case, the lower court did not confine itself to the proposed restart of TMI-1. Instead, the court sweepingly imposed a continuing obligation on the NRC to apply NEPA to the day-to-day operation of all licensed nuclear power plants, and refused to limit that obligation to "the happenstance that TMI-1 was shut down for refueling at the time of the [TMI-2 March 1979] accident." *Id.* at 231.[2] The court ordered that the case be remanded to the NRC for a determination by that agency of what procedures NEPA requires in light of the psychological health effects of continued operation of TMI-1, and specifically, whether a supplemental environmental impact statement ("EIS") should be prepared. *Id.* at 231 n. 12, 233-34.

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[2] As Judge Wilkey noted:

> [T]he majority suggests that any time a court decides merely that a supplemental EIS *may* be needed, it necessarily must order that the nuclear plant, or other federal activity, be shut down until the agency has considered the environmental issues. NEPA was not intended to result in such a major interference in already approved and already operating facilities.

People Against Nuclear Energy v. *United States Nuclear Regulatory Comm'n*, 678 F. 2d at 248 (Wilkey, J., dissenting) (emphasis in original). Moreover, on January 7, 1982, the majority enjoined restart of TMI-1 until the NRC had completed an environmental assessment, even though restart decisions are normally quite routine.

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A.

The NRC's Continuing Responsibilities Over Licensed Nuclear Power Plants Do Not Constitute a Proposal for Major Federal Action Within the Scope of NEPA

The lower court's determination that NEPA requires continual reassessment of the environmental effects of day-to-day operation of licensed nuclear power plants was predicated solely on the fact that the NRC has continuing supervisory responsibilities over the operation and maintenance of such facilities. Although the NRC's supervisory responsibilities are extensive, they nevertheless cannot, standing alone, trigger NEPA. As explained in *Kleppe* v. *Sierra Club*, 427 U. S. 390, 419 n. 1 (1976) (Marshall, J., concurring), when a federal agency is initiating its own proposal, NEPA is more demanding. However, when private action is to be approved, NEPA only seeks to assure that the agency considers environmental impacts during the formulation of a position on the proposal submitted by private parties. *See also Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U. S. 289, 320 (1975). This distinction establishes that federally authorized private action and private action are not synonymous for NEPA purposes. As explained in *Federal Tort Claim of General Public Utilities Corp.*, CL1-81-10, 12 N. R. C. 773 (1981), the regulatory framework established by the AEA imposes distinctly different sets of responsibilities on the NRC and the industry regulated by that agency. Licensees bear the primary responsibility for constructing and

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That injunction was subsequently lifted, but only because of independent problems delaying reopening of the plant. Indeed, the majority's opinion suggests that it would have felt equally compelled to order a *shut down* of TMI-1, pending the determination of whether to prepare a supplemental EIS, had the plant been in operation at the time of the TMI-2 accident. *Id.* at 246-47. Apparently, the court found the fact that TMI-1 was shut down for refueling to be entirely irrelevant to its determination to impose a continuing obligation to reassess environmental impacts.

operating their nuclear facilities safely. In contrast, the NRC is responsible for prescribing minimum health and safety licensing standards for nuclear facilities, and for inspecting licensees' operations in light of these standards. The NRC's function is to ensure, through its licensing and inspection responsibilities, that licensees meet the agency's standards. Thus, when the NRC supervises the operation of licensed plants, it does no more than oversee and regulate continuing private activity.

Moreover, it is a well-established rule that NEPA is triggered only if there is a proposal for action. *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U. S. 289, 320 (1975). NRC action on a utility's application for a construction permit or operating license involves a proposal for major federal action. But a utility's operation of a licensed facility within the terms of its license is nothing more than continuing private activity. No new proposal for federal action is involved in such operation. Both the NRC and the licensee are merely carrying out the activities which were contemplated at the time the operating license was issued.

Even though the NRC's supervisory responsibilities are extensive, they nevertheless cannot create a continuing obligation on the part of the NRC to continually reassess licensed facilities in accordance with NEPA. Section 102(2)(C) of NEPA, 42 U. S. C. § 4332(C), directs federal agencies to prepare an EIS "in every recommendation or report on *proposals for . . . major Federal actions . . .*" (emphasis supplied) NEPA speaks solely in terms of proposed actions, and this Court has stressed the fact on numerous occasions. *Weinberger* v. *Catholic Action of Hawaii*, 454 U. S. 139, 142, 146 (1981); *Andrus* v. *Sierra Club*, 442 U. S. 347, 361-62 (1979); *Kleppe* v. *Sierra Club*, 427 U. S. 390, 399-406 (1976); *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U. S. 289, 320 (1975). A "proposal" is more than mere contemplation of possible action. *Kleppe* v. *Sierra Club*, 427 U. S. at 404. NEPA is triggered during the planning stage of agency action so as to require

environmental review only if "an agency's planning ripens into a 'recommendation or report on proposals for ... major Federal actions ...'" *Andrus* v. *Sierra Club,* 442 U. S. at 350 and n. 2. The Court's own examples of proposals for major federal action include agency decisions whether to issue a lease, approve a mining plan, issue a right-of-way, or take other action to allow private activity. *Kleppe* v. *Sierra Club,* 427 U. S. at 399. In the absence of such a proposal for major federal action, there is nothing to analyze under NEPA. *Id.* at 401.[3]

The lower court's decision also disregards regulations promulgated by the CEQ, whose interpretations are entitled to substantial deference. *Andrus* v. *Sierra Club,* 442 U. S. at 358. The lower court, while recognizing that the NRC has discretion to choose its procedures for complying with NEPA, remanded with the instruction that the NRC determine whether a supplemental EIS should be prepared. *People Against Nuclear Energy* v. *United States Nuclear Regulatory Comm'n,* 678 F. 2d at 226. CEQ regulations regarding supplemental EIS's provide that one should be prepared if: "(i) The agency makes substantial changes in the *proposed* action that are relevant to environmental concerns; or (ii) there are significant new circumstances or information relevant to environmental concerns and bearing on the *proposed* action or its impacts." 40 C. F. R. § 1502.9(c)(1)(i) and (ii) (1981). (emphasis supplied). The

[3] Notably, other courts presented with similar issues have concluded correctly that an EIS analyzing mere continuing operation of a facility is not required. *See, e.g., Burbank Anti-Noise Group* v. *Goldschmidt,* 623 F. 2d 115 (9th Cir. 1980), *cert. denied,* 450 U. S. 965 (1981) (EIS not necessary before existing airport could be purchased with federal financial assistance); *Westside Property Owners* v. *Schlesigner,* 597 F. 2d 1214 (9th Cir. 1979) (EIS not necessary for formalization of German pilot training program). *See also Defenders of Wildlife* v. *Andrus,* 627 F. 2d 1238, 1244 (D. C. Cir. 1980) (EIS not necessary when an agency does nothing more than fail to prevent a party's action from occurring).

requirement that there be a proposal is thus retained in the regulations. CEQ defines it as follows: " 'Proposal' exists at the stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated." 40 C. F. R. § 1508.23 (1981). A utility's routine operation of a nuclear power plant within the terms of its license is ongoing private action; it does not come within CEQ's definition of a proposal.[4] Nor are the NRC's continuing supervisory responsibilities over the day-to-day operations of such a plant within the scope of CEQ's definition: supervision does not require the NRC to be actively preparing any decision with respect to plant operation.

> In another context, the court of appeals has admitted that:
>
> [W]e cannot allow NEPA to be bloated, and indeed enfeebled, by pushing the logic of Section 102(2)(C) to ridiculous extremes. NEPA does not require an annual EIS on routine operation and maintenance of every program with significant environmental ramifications. Its rule of reason does not demand rethinking of everything all the time.

Sierra Club v. *Andrus*, 581 F. 2d 895, 906 (D. C. Cir. 1978), *rev'd on other grounds*, 442 U. S. 347 (1979). However, the court of appeals apparently believes there is no such thing as "too hard a look" where nuclear power is concerned.[5]

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[4] For reasons stated below, the TMI-1 restart proceeding probably would fit within the definition of a "proposal for major federal action." *See* p. 17, *infra*.

[5] *Natural Resources Defense Council, Inc.* v. *United States Nuclear Regulatory Comm'n*, 685 F. 2d 459, 517 (D. C. Cir. 1982) (Wilkey, J., dissenting), *cert. granted sub nom., Baltimore Gas & Electric Co.* v. *Natural Resources Defense Council, Inc.*, 51 U. S. L. W. 3419 (Nov. 29, 1982) (No. 82-524). Judge Wilkey added: "If there was ever a doubt prior to today, it is now clear that this court is committed to an assumed role as high public protector of all that is good from perceived evils of the nuclear age." *Id.*

B.

The Court of Appeals' Ruling That NEPA Requires Continual Environmental Reassessment Contravenes Both the Concept of Finality of Agency Action and Congressional Intent as Expressed in the Atomic Energy Act

The consequence of the court of appeals' decision is to make operating licenses, which Congress intended to be effective for periods of up to forty years, terminable at will based on continual federal environmental cost/benefit balancing. Although operating licenses may, of course, be modified, suspended or revoked at anytime for *safety* reasons, in accordance with 42 U. S. C. §§ 2236, 2237 (1976), nothing in the AEA or NEPA suggests that forty-year operating licenses may be modified, suspended or revoked based on continuing federal environmental cost/benefit balancing. The forty-year operating license period was chosen as an incentive to encourage utilities to build nuclear power plants.[6] Nothing in the court of

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[6] The first proposal in April, 1954 to amend the Atomic Energy Act of 1946 provided for a 25 year limitation on operating licenses. Joint Comm. on Atomic Energy, 83d Cong., 2d Sess., *A Proposed Act to Amend the Atomic Energy Act of 1946* 21 (Comm. Print April 1954), *reprinted in* 1 U. S. A. E. C., Legislative History of the Atomic Energy Act of 1954, at 81 (1955). However, in hearings held before the Joint Committee on Atomic Energy in May, 1954, a representative of interested public utilities testified that the need to finance and amortize nuclear facilities over a 25 year period would place an undue price burden on nuclear generated electricity in relation to electricity generated with conventional fuels. He encouraged Congress either to extend the operating license period to 40 years (the normal amortization period in the electric utility industry) or add a statutory provision which would allow utilities to "count absolutely" on renewal of their operating licenses after 25 years. *S. 3323 and H. R. 8862 to Amend the Atomic Energy Act of 1846: Hearings Before the Joint Committee on Atomic Energy*, 83d *Cong.*, 2d Sess., 230-31 (1954) (Statement of E. H. Dixon), *reprinted in* 2 U. S. A. E. C., *Legislative History of the Atomic Energy Act of 1954*, at 1864-1865 (1955). Apparently in response to this testimony, the Joint Committee amended the pro-

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appeals' decision justifies destroying the finality contemplated by the AEA. The decision instead disrupts the orderly and workable procedures contemplated by Congress. Rather than requiring a "hard look", the court of appeals' decision apparently now compels the NRC to never stop looking, at the expense of the concept of finality of agency action.

III.

CURRENT NEPA PROCEDURES EMPLOYED BY THE NRC FULLY SATISFY THE REQUIREMENTS OF THE ACT, AND WOULD JUSTIFY APPLICATION OF NEPA TO THE TMI-1 RESTART PROCEEDING. THE COURT-CREATED OBLIGATION TO REASSESS CONTINUALLY ENVIRONMENTAL IMPACTS OF ALL NUCLEAR POWER PLANTS WILL IMPOSE A SUBSTANTIAL BURDEN ON THE NRC AND THE INDUSTRY IT REGULATES.

The procedures currently employed by the NRC to satisfy NEPA requirements assure a rigorous and exhaustive environmental review prior to operation of nuclear power plants. *See generally Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, 526-27 (1978). In order to obtain a construction permit for a proposed nuclear power plant, an applicant must file an environmental report which surveys and evaluates a wide variety of environmental costs and benefits over the plant's forty-year life, together with a discussion of possible alternatives to the plant.

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posed bill to extend the maximum operating license period to 40 years. Joint Comm. on Atomic Energy, 83d Cong., 2d Sess., *Draft in Bill Form* 41 (Comm. Print May 21, 1954) reprinted in 1 U. S. A. E. C., *Legislative History of the Atomic Energy Act of 1954*, at 297 (1955). The latter proposal became law on February 17, 1954. Atomic Energy Act of 1954, ch. 703, 68 Stat. 919 (1954).

10 C. F. R. § 51.20 (1982).[7] Based on these submissions and its own independent evaluations, the NRC staff then prepares a draft environmental statement which is distributed to other federal, state and local agencies and to the public for comment, after which a final EIS is prepared and distributed. 10 C. F. R. §§ 51.24, 51.25, 51.26 (1982). A mandatory public adjudicatory hearing is then held, in which the draft and final EIS's and any comments thereon are considered, together with the application and the NRC staff's safety evaluation. 42 U. S. C. § 2239(a)(1976). Interested persons are entitled to intervene and litigate virtually any aspect of the safety or environmental impact of the proposed facility. *See generally* 10 C. F. R. Part 2, Appendix A (1982). If a construction permit is awarded, the utility then proceeds to build the plant at its own risk. *Power Reactor Development Corp.* v. *International Union of Electrical, Radio and Machine Workers*, 367 U. S. 396 (1961). A utility's financial commitment at this stage easily approaches several billion dollars.

A similar safety and environmental review process is again required once the utility applies for a license to operate the plant it has constructed. Another environmental report is required, draft and final EIS's must again be prepared and

[7] According to USNRC, Regulatory Guide 4.2, Preparation of Environmental Reports for Nuclear Power Stations (Rev. 2, 1976), an applicant's environmental report must address the purpose of the proposed facility and associated transmission facilities, the site and environmental interfaces (including geography, demography, ecology, meterology, hydrology, geology, regional historic archaelogical, architectural, scenic, cultural and natural features, and noise) the effects of station construction and operation (including radiological and non-radiological effluents), effluent monitoring, environmental effects of accidents, socio-economic impacts, alternative energy sources and sites, station design alternatives, and a cost/benefit analysis. This guidance is substantially amplified by USNRC, NUREG 0555, Environmental Standard Review Plans for the Environmental Review of Construction Permit Applications for Nuclear Power Plants (May 1979). The Environmental Reports so produced are exhaustive multi-volume treatises.

circulated, and public adjudicatory hearings are again held upon request of any interested person potentially affected by proposed operation of the plant. 42 U. S. C. § 2239(a) (1976); 10 C. F. R. §§ 51.21, 51.22-51.26 (1982). Even after a forty-year operating license has been issued, if a licensee proposes any changes to the facility which require license amendments,[8] the NRC will at least prepare an environmental assessment and may prepare an EIS, if the license amendment is likely to have a significant impact on the human environment or if, as a matter of discretion, it so chooses.[9] Once again, public adjudicatory hearings regarding safety and environmental impacts of the proposed action are held at the request of any interested person.[10]

These exhaustive procedures require the NRC to evaluate environmental impacts whenever major federal action regarding a nuclear power plant is proposed: either issuance of a construction permit, issuance of an operating license, or amendment of a previously issued license or permit. Each stage of NRC involvement is a readily identifiable, discrete proposed

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[8] Licensees can make some changes at nuclear power plants without prior NRC safety and environmental review, but only if such changes do not involve "unreviewed safety questions." *See* 10 C. F. R. § 50.59 (1982).

[9] *See* 10 C. F. R. §§ 51.5, 51.7 (1982); *Virginia Electric Power Company* (Surry Nuclear Power Station, Units 1 and 2), CLI-80-4, 11 N. R. C. 405 (1980) (preparation of an environmental impact statement on licensee's proposal to repair steam generators); *Commonwealth Edison Company* (Dresden Nuclear Power Station, Unit No. 1), DD-80-24, 11 N. R. C. 951 (1980) (discretionary preparation of environmental impact statement for proposed chemical cleaning).

[10] Whenever a proposed license amendment involves a significant hazard consideration, a hearing, if requested, must be held prior to issuance of the amendment. 42 U. S. C. § 2239(a) (1976). The Court of Appeals for the District of Columbia Circuit has held that a prior hearing must be held, if requested, even in cases which the NRC has determined do not involve "significant hazards considerations." *Sholly* v. *United States Nuclear Regulatory Comm'n*, 651 F. 2d 780 (D. C. Cir. 1980), *cert. granted*, 451 U. S. 1016 (May 26, 1981).

federal action; accordingly, each stage may, without hesitation, be described as a proposal for major federal action within the terms of NEPA, for which an environmental assessment, or where there are significant impacts, an EIS is properly required. Section 102(2)(C), 42 U. S. C. § 4332(C); *Natural Resources Defense Council, Inc.* v. *United States Nuclear Regulatory Comm'n*, 547 F. 2d 633, 638 (D. C. Cir. 1976), *rev'd on other grounds sub. nom. Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519 (1978).

In the case of TMI-1, the final EIS reviewing TMI-1's proposed license to operate was issued in December, 1972. Moreover, the proposed restart of TMI-1 easily comes within CEQ guidelines and this Court's interpretations of NEPA as a proposal for major federal action. The NRC has been actively preparing to make a decision whether to allow restart. 40 C. F. R. § 1508.23 (1981); *Kleppe* v. *Sierra Club*, 427 U. S. at 404.[11] Under the circumstances, it was unnecessary for the court of appeals to create new law, holding on what Judge Wilkey in dissent termed the "broadest conceivable" ground, that NEPA requires continual reassessment of environmental impacts of *all* licensed nuclear power plants.[12]

At the very least, the effect of the court's expansive interpretation of the NRC's continuing NEPA responsibilities will be to divert NRC and industry resources now used to

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[11] During the restart proceeding, several parties argued that an EIS should be prepared before a decision could be made. The NRC staff disagreed but nevertheless prepared an environmental impact appraisal, concluded that no significant impacts would result if TMI-1 was to resume operations, and recommended the issuance of a negative declaration. *Environmental Impact Appraisal by the Division of Engineering Evaluating the Proposed Restart of Three Mile Island Nuclear Station, Unit 1* (March 27, 1981) Joint App. at 48. *See* 40 C. F. R. § 1508.9 (1981).

[12] *People Against Nuclear Energy* v. *United States Regulatory Comm'n*, 678 F. 2d at 244 (Wilkey, J., dissenting).

assure the safety of licensed, operating nuclear plants and to conduct safety and environmental reviews of new nuclear plants, so that redundant environmental documents for plants already licensed after thorough environmental scrutiny may be prepared. This Court has previously recognized the problem of redundancy. In *Andrus* v. *Sierra Club,* 442 U. S. at 362, after concluding that appropriations requests merely fund actions already proposed, and accordingly, do not trigger NEPA, the Court noted: "Section 102(2)(C) is thus best interpreted as applying to those recommendations or reports that actually propose programmatic actions . . . *Any other result would create unnecessary redundancy* . . . [otherwise] the resulting EIS's would merely recapitulate the EIS's that should have accompanied the initial proposals of the programs." (emphasis supplied) *See also* 40 C. F. R. § 1502.5 (1981) (EIS's are not intended to rationalize or justify decisions already made). The most likely result of the court of appeals' decision will be to require the endless preparation of supplemental environmental impact statements, whenever it is determined that there are significant new circumstances or information relevant to environmental concerns and bearing on the operation of a licensed, operating facility. 40 C. F. R. § 1502.9(c)(ii). As dissenting Judge Wilkey pointed out, under the CEQ regulations:

> Preparation of an EIS or a supplemental EIS is required only for proposed *actions.* Yet under the majority's interpretation, the NRC is engaged in such "action" every second of every day. It thus will be possible for NEPA to apply even when a nuclear plant is operating pursuant to an NRC license and the NRC proposes to take no action to upset this status quo.

People Against Nuclear Energy v. *United States Nuclear Regulatory Comm'n,* 678 F. 2d at 244 (Wilkey, J., dissenting) (emphasis in original).

In a footnote, the court of appeals opines that if no "substantial changes" occur and no "significant new circumstances or information relevant to environmental concerns" arise, the court of appeals' ruling will not significantly increase the NEPA burden on regulatory agencies in the future. *Id.* at 233 n. 16. However, new circumstances and information *always* arise following issuance of any operating license which could make the EIS prepared at the operating license stage subject to supplementation.[13] For example, the relative costs and benefits of nuclear generation typically set out in an NRC-prepared final environmental statement depend on comparisons of fuel costs and projections of electricity demand which continually change. The alternatives against which continued operation could be evaluated under NEPA also change with time. *See Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, 551-53 (1978).[14] The

[13] Indeed, as this Court has pointed out in a similar context:

"Administrative consideration of evidence . . . always creates a gap between the time the record is closed and the time the administrative decision is promulgated [and, we might add, the time the decision is judicially reviewed]. . . . If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstances has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening." *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, 554-55 (1978) (*quoting Interstate Commerce Comm'n* v. *Jersey City*, 322 U. S. 503, 514 (1944)).

[14] Effective April 26, 1982, the NRC has adopted rules excluding consideration of need for power and alternative energy source issues in operating license proceedings. *See* 47 Fed. Reg. 12,940 *et. seq.* (March 26, 1982) (amending 10 C. F. R. §§ 55.21, 51.23(e), 51.53). The NRC stated that these issues are considered thoroughly at the construction permit stage and experience has shown that repeated consideration at the operating license stage is unlikely to tip the NEPA cost/benefit analysis against issuance of an operating license for a plant which has already been completed. *Id.* This reasoning

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study of nuclear power in this country and around the world annually creates volumes of new environmental and safety information, widely disseminated to the scientific community and the public; some of it may be regarded as altering the cost/benefit balance struck by the NRC when a construction permit or operating license was issued. And, of course, whenever a court fashions novel environmental impacts, such as "psychological distress" or "uncertainties",[15] supplemental EIS's may be required for every reactor already licensed.

The obligation now imposed on the NRC and potentially on all other federal agencies is unreasonably burdensome. Neither NEPA, nor this Court's precedent interpreting it, nor the relevant regulations, nor public policy behind them or the Act impose the substantial burden of a continuing obligation to re-evaluate ongoing, licensed facilities operated by private parties subject to federal oversight. The ruling conflicts with both Congressional intent and this Court's earlier interpretations of what NEPA requires of federal agencies. As noted in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, 558 (1978): "NEPA does set forth significant substantive goals for the Nation, *but its*

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would also apply to preclude reconsideration of these issues in supplemental environmental impact statements. However, it is unknown whether this new rule will survive a "hard look" by the Court of Appeals for the District of Columbia Circuit. *See People Against Nuclear Energy* v. *United States Nuclear Regulatory Comm'n*, 678 F. 2d at 234 n. 20; *see also Natural Resources Defense Council, Inc.* v. *United States Nuclear Regulatory Comm'n*, 685 F. 2d 459, 546 (D. C. Cir. 1982) (Statement of Senior Circuit Judge Bazelon as to why he voted to deny rehearing), *cert. granted sub nom., Baltimore Gas & Electric Co.* v. *Natural Resources Defense Council, Inc.*, 51 U. S. L. W. 3419 (Nov. 29, 1982) (No. 82-524).

[15] *See Natural Resources Defense Council, Inc.* v. *United States Nuclear Regulatory Comm'n*, 685 F. 2d 459 (D. C. Cir. 1982), *cert. granted sub nom., Baltimore Gas & Electric Co.* v. *Natural Resources Defense Council, Inc.*, 51 U. S. L. W. 3419 (Nov. 29, 1982) (No. 82-524).

mandate to the agencies is essentially procedural." (emphasis supplied) Courts may not impose additional procedural requirements not stated in the plain language of the Act. *Id.* at 548; *Kleppe* v. *Sierra Club*, 427 U. S. 390, 405-406 (1976). Nothing in NEPA supports the proposition that Congress intended to require federal agencies to review continually the environmenal effects of nuclear power plants already licensed, in the absence of any further proposal for federal action. Four years ago, the Court admonished the court of appeals that:

> Nuclear energy may some day be a cheap, safe source of power or it may not. But Congress has made a choice to at least try nuclear energy, establishing a reasonable review process in which courts are to play only a limited role. The fundamental policy questions appropriately resolved in Congress and in the state legislatures are *not* subject to reexamination in the federal courts under the guise of judicial review of agency action. Time may prove wrong the decision to develop nuclear energy, but it is Congress or the States within their appropriate agencies which must eventually make that judgment.

Vermont Yankee Nuclear Power Corp. v. *Natural Resources Defense Council, Inc.*, 435 U. S. at 557-58 (1978) (emphasis in original). NEPA has never been interpreted to require agencies to elevate environmental concerns over other appropriate considerations; on the contrary, once an agency has made a decision involving NEPA's procedural requirements, a reviewing court's role is limited to insuring that the agency has considered environmental consequences before deciding a course of action on a proposal. *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U. S. 223, 227 (1980) (quoting *Kleppe* v. *Sierra Club*, 427 U. S. at 410 n. 21). The lower court's decision is an unwarranted departure from the limited role of reviewing agency action, and it should not stand uncorrected.

CONCLUSION

For the reasons stated above, *amicus curiae* Atomic Industrial Forum urges the Court to reverse the decision of the court of appeals.

Respectfully submitted,

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